rule." *Brandon v. Holt*, 469 U.S. 464, 471 (1985). In *Brandon*, this Court permitted an amendment pursuant to Rule 15(b) for the first time in the proceedings before the Supreme Court based solely on one sentence in the Petitioner's reply brief. *Id.* at 473.

The Town's assertion that it has not tried by express consent the seventy-foot issue or that an amendment pursuant to 15(b) must be first made in the courts below is not supported by the facts of this case or by the aforementioned authority.

## CONCLUSION

Bochese maintains that he suffered a concrete injury as a result of the Town down-zoning his property and eliminating the seventy-foot building height use causing the diminution in the value of his property so as to confer standing under Article III of the Constitution. These claims and issues were litigated pursuant to the amended complaint, in the summary judgment proceedings and pursuant to the express stipulation set forth in the joint pre-trial stipulation and were considered by the District Court before it entered its order granting summary judgment. The procedural due process violations occasioned by the *sua sponte* expansion of the *Rooker-Feldman* Doctrine by the trial court and the erroneous *sua sponte* review of the issues by the appellate court coupled with the new rule created by the Eleventh Circuit creating a common law contract exception to *Euclid*, have prevented Bochese from demonstrating a concrete injury. The procedures adopted and the exception to standing articulated by the Eleventh

Circuit are in conflict with the opinions of this Court and are certain to be highly disruptive.

Bochese requests that this Court create a bright-line rule as to when parties are to receive notice and an opportunity to be heard on *sua sponte* deliberations. Bochese also requests that this Court reject the Eleventh Circuit's exception to standing wherein a state's common law of contracts preempts the due process clause, which historically provided standing for property owners whose property values are diminished by arbitrary and irrational zoning actions.

For the forgoing reasons and those in the petition, the petition for the writ of certiorari should be granted. In the alternative, the petition should be granted and the judgment of the Court of Appeals vacated and the case remanded for further consideration.

Respectfully submitted,

PAUL M. MEREDITH*
P.O. Box 38
St. Augustine, FL 32085
Telephone: (904) 825-1942
Facsimile: (904) 825-1912
Florida Bar No.: 0745741

**Counsel of Record* *Attorney for Petitioner*

**BELL, LEEPER & ROPER, P.A.**
ATTORNEYS AT LAW
2816 EAST ROBINSON STREET
ORLANDO, FLORIDA 32803-5834

[Names And Addresses Omitted In Printing]

April 20, 2005
**Via Facsimile – 904-825-1912**
Paul M. Meredith, Esquire
P.O. Box 38
St. Augustine, Florida 32085-0038

**Re: *Bochese v. Town of Ponce Inlet, Florida***
**Case No.: 2004-30574-CICI-32**
**Our File No.: 004-082**

Dear Mr. Meredith:

We are now in receipt of your Notice of Serving Third Party Subpoena Duces Tecum and First Request for Production of Documents regarding the above-referenced matter. Please be advised that this discovery was not received until Friday, April 15, 2005, despite having a Certificate of Service date of March 29, 2005. It appears that your office inadvertently placed an incorrect zip code on the envelope causing a two week delay. Please advise as to whether you will grant the Town its entitlement to a full thirty (30) days to respond to this discovery request.

In light of receipt of these documents, I will assume that you have abandoned your Motion to Stay Proceedings and will be canceling your April 26, 2005 hearing. If you have decided to proceed with case, please be advised that the Town will assert that the April 7, 2005 published decision rendered by the Eleventh Circuit as well as Judge Walsh's decision in the previous declaratory action bars your Bert J. Harris Act claim under the collateral estoppel doctrine. This assertion has been raised in our affirmative

defenses and based on three judicial decisions finding "no injury in fact", the Town will assert that proceeding with this claim exposes you and your client to sanctions under Section 57.105 *Fla. Stat.* Therefore, you may consider this letter as the Town's notice to you, your firm, and your client that it intends on seeking reimbursement for any and all attorney's fees and costs should the Town prevail in this action. A copy of our proposed motion is attached for your review. Please also be advised that I will need to prepare a motion to add Mrs. Bochese as an indispensable party to this litigation.

Finally, I have contacted Judge Walsh's Judicial Assistant to obtain available hearing times in July to address the Town's Motion for Summary Judgment and Motion to Join an Indispensable Party. These dates are:

July 25 and 28 – All Day is open with last hearing at 3:00 p.m.

July 26 – All is open except for 10:30 a.m.

July 27 – Morning is open

July 29 – All day is open with last hearing at 2:00 p.m.

Please advise this office as soon as possible if any of the above dates are available so that we may schedule same.

In the interim, should you have any questions or concerns, please feel free to contact my office.

With regards,

/s/ Ernest Kohlmyer
Ernest H. Kohlmyer, III

EHK/lal
Enclosure
cc: Mr. Bernie Murphy, Town Manager
Theodore R. Doran, Esquire

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR
VOLUSIA COUNTY, FLORIDA

| | | |
|---|---|---|
| ALFRED L. BOCHESE,<br>Plaintiff,<br>vs.<br>THE TOWN OF PONCE INLET,<br>A municipal corporation<br>organized under the laws<br>of the State of Florida,<br>Defendant. | ) | CASE NO.<br>2004-30574-CICI-32 |

**DEFENDANT, TOWN OF PONCE INLET, FLORIDA'S MOTION FOR SANCTIONS PURSUANT TO SECTION 57.105 FLA. STAT. AGAINST PLAINTIFFS, ALFRED AND FRANCES BOCHESE, PAUL MEREDITH, ESQUIRE AND THE MEREDITH FIRM, P.A.**

COMES NOW, the Defendant, TOWN OF PONCE INLET, FLORIDA, and files this its Motion Sanctions Pursuant to Florida Statute 57.105 and in support thereof states as follows:

1. Florida Statutes Section 57.105 provides that the Court upon Motion of the party, shall award reasonable attorney's fees to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim in which the court finds that the losing party or the losing party's attorney knew or should have known that the claim, when initially presented to the court, was either not supported by the material facts necessary to establish the claim, or would not be supported by the

application of existing law to those material facts. *Florida Statutes Section 57.105(1).*

2. Section 57.105 further requires that the parties seeking sanctions under this section serve the Motion on the opposing party, and provide twenty-one (21) days after service of the Motion for the opposing party to withdraw or properly correct the claim. *Florida Statutes Section 57.105(4).*

3. On April 23, 2005, counsel for Defendant served upon counsel for Plaintiff a copy of this Motion with correspondence requesting the Plaintiff to file a Dismissal with Prejudice, as Plaintiff cannot establish that the claims brought pursuant to the Florida's "*Bert J. Harris Act*", Section 70.0001 *Fla. Stat.*

4. Information provided to Plaintiff and Plaintiff's counsel prior to the filing of this lawsuit demonstrated that the claims were not supported by the necessary material facts to establish a claim for damages under Florida's "Bert J. Harris Act", and that such claims were not supported by the application of the then-existing law to the material facts. Further, said claims were brought exclusively for the purpose of harassment and should be deemed frivolous as a matter of law.

5. As Plaintiff chose to proceed on his claim against Defendant, Town of Ponce Inlet, Florida despite the binding and final decisions of this court in the following cases:

(A) Order on Declaratory Relief dated March 17, 2003 issued by Judge David Walsh in the case: *The Town of Ponce Inlet, Florida v. Ponce Lighthouse Properties. Inc., Towers VII Condominium Association, Inc., Michael DiFranco and Elizabeth*

*DiFranco, his wife, David Jacobs and Ann Jacobs, his wife,* in the Circuit Court. Seventh Judicial Circuit, in and for Volusia County, Florida, Case No. 2002-30561-CICI (order to be attached upon filing motion).

(B) Substituted Order on Declaratory Relief dated April 11, 2003 issued by Judge David Walsh in the case: *The Town of Ponce Inlet, Florida v. Ponce Lighthouse Properties, Inc. Towers VII Condominium Association, Inc., Michael DiFranco and Elizabeth DiFranco, his wife, David Jacobs and Ann Jacobs, his wife,* in the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, Case No. 2002-30561-CICI (order to be attached upon filing motion).

(C) Order granting Town of Ponce Inlet's Motion for Summary Judgment dated March 23. 2004 rendered by Judge Antoon of the United States District Court, Middle District of Florida, Orlando Division (order to be attached upon filing motion).

(D) Reported Opinion from the United States District Court for the Eleventh Circuit dated April 7, 2005 (decision to be attached upon filing motion).

6. The decisions of these courts clearly places Plaintiff's counsel on notice that the subject claim is meritless and frivolous. Thus, Defendant is entitled to sanctions pursuant to Florida Statutes, Section 57.105.

7. Consequently, Defendant is entitled to an award of attorneys fees as a sanction against Plaintiff and Plaintiff's counsel for knowingly raising and/or maintaining an unsupported claims [sic] based on the decisions of these court.

WHEREFORE, Defendant, TOWN OF PONCE INLET, FLORIDA, respectfully requests this Honorable Court enter an Order awarding sanctions pursuant to Florida Statutes Section 57.105.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Paul M. Meredith, Esquire, P.O. Box 38, St. Augustine, Florida 32085-0038 by U.S. mail this ___ day of May, 2005

MICHAEL J. ROPER, ESQUIRE
Florida Bar No. 0473227
ERNEST H. KOHLMYER, III, ESQUIRE
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Town of Ponce Inlet, Florida

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ATTORNEYS
A PARTNERSHIP OF PROFESSIONAL ASSOCIATIONS
444 SEABREEZE BOULEVARD, SUITE 800
DAYTONA BEACH, FLORIDA 32116

[Names And Addresses Omitted In Printing]

February 13, 2003

To: William P. Hoak, Mayor
Frank Rogerson, Vice Mayor
Pat Andreano, Councilperson
Nancy Epps, Councilperson
Tony Goudie, Councilperson

CC: Bernie Murphy

From: Theodore R. Doran

Re: **Alfred and Frances Bochese's Claim for Compensation Pursuant to § 70.001, Fla. Stat., "Bert J. Harris, Jr. Private Property Rights Protection Act"**

---

As we shared with you in our previous memorandum of November 15, 2002, Mr. and Mrs. Alfred Bochese notified the town of their intent to sue it under Florida's "Bert J. Harris, Jr., Private Property Rights Protection Act" ("Act") in August of 2002. This claim should not be confused with Mr. Bochese's recently dismissed election lawsuit appeal against the Town and Ms. Andreano by the 5th District Court of Appeals, nor his recently filed federal lawsuit which the Town recently responded to by filing a Motion to Dismiss with Prejudice.

As required by the Act, the Town provided notice of the claim to owners of contiguous property and the Florida Department of Legal Affairs. The Act requires the Town to

make a written settlement offer to Mr. and Mrs. Bochese by February 21, 2003 to effectuate one or more of the following:

> 1. An adjustment of land development or permit standards of other provisions controlling the development of land;
>
> 2. Increases or modifications in the density, intensity, or use of areas of development;
>
> 3. The transfer of developmental rights;
>
> 4. Land swaps or exchanges;
>
> 5. Mitigation, including payments in lieu of onsite mitigation;
>
> 6. Location on the least sensitive portion of the property;
>
> 7. Conditioning the amount of development or use permitted;
>
> 8. A requirement that issues be addressed on a more comprehensive basis tha [sic] a single proposed use of development;
>
> 9. Issuance of the development order, a variance, special exception, or other extraordinary relief;
>
> 10. Purchase of the real property, or an interest therein, by an appropriate governmental entity;
>
> 11. *No changes to the action of the governmental entity.*
>
> *See*, § 70.001(4)(c), Fla. Stat. (emphasis added)

After consultation with Mr. Murphy, we recommend that the Town authorize me to render a written settlement offer to Mr. and Mrs. Bochese which effectuates no change

to the Town's actions as to the subject property. A vote by the Town Council will be needed at your regularly scheduled February 19, 2003 meeting. Enclosed is a copy of my proposed letter to their attorney, Paul Meredith.

Mr. and Mrs. Bochese claims that the Town "inordinately burdened" their beachfront home located at 4671 S. Atlantic Avenue by rescinding Ordinance 84-11, the Fourth Amendment to the Development Agreement between the Town and Ponce Lighthouse Properties, Inc., applying Ordinance 91-10 ("Gordis Preston Line") and restoring their property to the T-1 zoning application. They claim that these acts diminished their home's value in "excess of $400,000." However, as you know, Ordinance 84-11 was rescinded as it clearly violated the Town charter's 35-foot height restriction as passed by the voters in 1983. Further, Ponce Lighthouse Properties, Inc. never held unified ownership or control over the Bochese's home, a condition precedent for a property being zoned into the Planned Unit Development ("P.U.D.") classification. Of course, each of these arguments has been addressed in the Town's pending litigation with Ponce Lighthouse Properties, Inc.

In short, we believe that the Bochese's claim is frivolous and, at best, weak. Based on their claim, the Bochese's seek for the Town to violate its charter and land development regulations. As such, we do not recommend that any steps be taken at this time to afford the Bochese's administrative or monetary relief. Please feel free to contact me regarding this matter. Otherwise, I look forward to meeting with you at our upcoming Town Council meeting.

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO: 2004-30574-CICI

DIV. 32-WALSH

ALFRED L. BOCHESE,

Plaintiff,

vs.

TOWN OF PONCE INLET, a municipal corporation organized under the laws of the State of Florida,

Defendant.

_____/

**COMPLAINT**

**TAKINGS CLAIM UNDER BERT J. HARRIS**

(Filed April 1, 2004)

The Plaintiff, ALFRED L. BOCHESE, by and through his undersigned counsel, sues the Defendant, THE TOWN OF PONCE INLET, for inordinately burdening his vested rights which has resulted in a partial taking.

**JURISDICTIONAL BASIS OF THE CLAIMS**

1. This action is brought pursuant to Chapter 70, Florida Statutes as a result of the Defendant inordinately burdening the Plaintiff's vested rights and property interests such as the value of his ownership interests and the right to build to a 70ft. building height resulting in a partial taking of his property.

2. Pursuant to Chapter 70, Florida Statutes, notice of this claim and an appraisal has been provided to the TOWN OF PONCE INLET more than six months prior to filing this complaint. All pre-suit requirements pursuant to *Fla. Stat.* 70.001 have been met. (See Attached Exhibit)

* * *

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 2004-30574-CICI-32

ALFRED L. BOCHESE,

Plaintiff,

vs.

THE TOWN OF PONCE INLET, A municipal corporation organized under the laws of the State of Florida,

Defendant.

_____/

**DEFENDANT, THE TOWN OF PONCE INLET'S ANSWER AND AFFIRMATIVE DEFENSES**

COMES NOW, Defendant, THE TOWN OF PONCE INLET, by and through its undersigned counsel and hereby files this its Answer and Affirmative Defenses to Plaintiff's Complaint filed herein pursuant to the Florida Rules of Civil Procedure, and as for grounds therefore would state as follows:

**JURISDICTIONAL BASIS OF THE CLAIMS**

1. Admitted to the extent of that the jurisdictional and venue of this action is properly filed before this court, otherwise denied.

2. Admitted to the extent of that the jurisdictional and venue of this action is properly filed before this court, otherwise denied.

3. Admitted to the extent of that the jurisdictional and venue of this action is properly filed before this court, otherwise denied.

4. Admitted

* * *

*Elizabeth DiFranco, his wife, David Jacobs and Ann Jacobs, his wife*, in the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, Case No. 2002-30561-CICI

*Third Affirmative Defense*

19. Defendant affirmatively states that Plaintiff's claim under the Bert J. Harris Act is subject to dismissal because the Plaintiff's claim is barred by the doctrines of collateral estoppel and/or res judicata since the issue of the Town's height restriction governing this property was resolved by the Order on Town's Motion for Summary Judgment dated March 23, 2004 issued by Judge John Antoon in the case: *Alfred L. Bochese v. The Town of Ponce Inlet, Florida*, in the United States District Court, Middle District of Florida, Orlando, Division Case No. 6:02-CV-01253-ORL-28-JGG

*Fourth Affirmative Defense*

20. Defendant affirmatively states that Plaintiff's claim under the Bert J. Harris Act is subject to dismissal because the Plaintiff's claim is barred since Plaintiff's appraisal prepared by Barbara Samolinski was not a bona fide, valid appraisal as required under the statute.

*Fifth Affirmative Defense*

21. Defendant affirmatively states that Plaintiff's claim under the Bert J. Harris Act is subject to

dismissal because the Plaintiff has suffered no damages or loss in market value of this subject property.

*Sixth Affirmative Defense*

22. Defendant affirmatively states that Defendant is entitled to reasonable attorney's fees and costs pursuant to Section 70.001(5)(c)(2) *Fla. Stat.* and/or Section 57.105 *Fla. Stat.*

* * *